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IN THE

# Supreme Court of the United States

October Term, 1969

No. 1078

JOHN T. McCLAIN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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October Term, 1969

No. .....

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JOHN T. McCLAIN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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# PETITION FOR WRIT OF CERTIORARI

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Petitioner hereby prays for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the trial court as to him.

## OPINIONS BELOW

Petitioner was convicted by the trial court, sitting without jury; judgment was entered thereon April 22, 1968. On appeal, the United States Court of Appeals for the Ninth Circuit filed its decision on September 18, 1969, and a rehearing was denied November 10, 1969. The decision is attached to this petition as Appendix A. An extension of time in which to file for certiorari, to and including January 8, 1970, was granted by Mr. Justice Douglas.

## JURISDICTION

This suit was originally brought in the United States District Court for the Central District of California. Jurisdiction was based upon an indictment charging a violation of federal statute, Title 21, U.S.C., section 176a. The questions sought to be presented here were raised at the first available instance in the courts below.

The first question, concerning the impropriety of implying findings to support the verdict when it is not clear that an unconstitutional presumption was not relied on, was raised in the petition for rehearing filed in the Court of Appeals. The remaining questions were all raised before the Court of Appeals.

## QUESTIONS PRESENTED

The following questions are presented for determination by this Court:

1. Whether an appellate court which implied findings that the verdict was not based on an invalid constitutional ground,

where there was no way to determine if an impermissible statutory presumption had been utilized, violated Due Process.

2. Whether Title 21 U.S.C. 176a, under which petitioner was convicted, is unconstitutional in that it violates petitioner's privilege against self-incrimination.

3. Whether Title 21 U.S.C. 176a, under which petitioner was convicted, is unconstitutional for the reason that said statute deprived petitioner of a trial by jury in violation of the Sixth Amendment to the United States Constitution.

4. Whether petitioner could be treated as a second offender, in that his prior conviction was based on an unconstitutional statute which violated petitioner's rights under the Fifth Amendment to the United States Constitution.

## STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

Title 21 U.S.C. section 176a provides, in its material parts, as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the

United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 26 U.S.C. section 4704(a) provides, in its material parts, as follows:

"(a) **General Requirements.**—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package; and the absence of appropriate taxpaid stamps from the narcotic drugs shall be

prima facie evidence of a violation of this subsection by any person in whose possession the same may be found. . . . "

## STATEMENT OF THE CASE

Petitioner was convicted by the court, sitting without a jury, under an indictment charging that he, together with two others, on or about November 28, 1967, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of seventy kilograms of marihuana which he knew had theretofore been imported and brought into the United States contrary to law. Special findings of fact were waived.

One Juan Acosta Gutierrez testified that on November 23, 1967, he was hired in Mexico to drive a car containing marihuana to the "It Club" in Los Angeles, California, and there to contact a short, little, thin Mexican wearing black gabardine pants. He told the Customs officials about the plan. On November 24, he drove to the It Club, parked the car, left the key under the mat in accordance with instructions and entered the Club. While he was waiting, he testified, he saw petitioner and another man unload packages from the car. (R.T. 12-14.) This testimony was contradicted by petitioner (R.T. 186-191).

Petitioner's co-defendant, Cruz-Castro, testified that he saw petitioner at the It Club on November 24, that he saw someone unload the car after Gutierrez drove up and parked, and that the next day petitioner paid him $1,600 (R.T. 41-44). Cruz-Castro was only able to communicate with the petitioner by rudimentary sign language, since he speaks no English (R.T. 41). Petitioner unequivocally denied transferring $1,600 to

Cruz-Castro, or any other sum, and also denied bringing any packages into the It Club (R.T. 183-184).

Several Customs agents testified to the surveillance of the transaction. One saw co-defendant, Jones, remove packages from the fender walls of Gutierrez's car and saw petitioner place some packages in a red suitcase and put the suitcase in the trunk compartment of a Cadillac. (R.T. 110-119.)

Petitioner denied putting any packages into the suitcase or placing the suitcase in the Cadillac. He claimed that he did not have the keys to that car. (R.T. 186-191.)

## REASONS FOR GRANTING PETITION FOR CERTIORARI

### (a) Violation of Due Process.

The appellate court below noted that special findings of fact were waived, *McClain v. United States,* at pp. 1, 3, 9th Cir. No. 23,335 (Sept. 18, 1969) and implied findings in support of the judgment at the trial level, *ibia.* at 3.

While admitting that if this had been a jury trial and the jury had been instructed on the statutory inferences the conviction based on the statutory presumption could not stand, *ibid.* at 3, citing *Leary v. United States,* 395 U.S. 6 (1969), the court nevertheless noted that the case was tried without a jury and the specific findings were waived and thus thought it permissible to imply a finding that the verdict here was not based on the constitutionally defective statutory presumption. *McClain v. United States, supra,* at 3.

Implying facts in support of the verdict, in such a manner, is in violation of the rule of *Stromberg v. California,* 283 U.S.

359 (1931), as applied in *Street v. New York*, 89 S.Ct. 1354 (1969), and *Williams v. North Carolina*, 317 U.S. 287 (1942).

In *Williams*, the Court said that:

> "[t]o say that a general verdict should be upheld though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional right." 317 U.S. at 292.

As was the case in *Williams*, there is no way to determine here whether the verdict is based on a valid ground, and the fact that the case was tried before a judge does not make the danger that the conviction rested upon an unconstitutional ground any less likely. *Street v. New York, supra*, 89 S.Ct. 1354, 1363 (1969).

Thus, it is respectfully submitted that the conviction of petitioner was constitutionally defective in that it deprived him of Due Process of law.

**(b) Violation of Petitioner's Privilege Against Self-Incrimination.**

Title 21 U.S.C. 176a contains the statutory presumption that if "the defendant is shown to have or have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." Assuming *arguendo* that the presumption is held to apply in a non-jury case (such as the instant case), it is respectfully submitted that the presumption constitutes a violation of the defendant's privilege against self-incrimination, in that the

defendant is compelled to testify or suffer a judgment of conviction on no more evidence than the fact of possession and the existence of the presumption.

Apparently, *Yee Hem v. United States,* 268 U.S. 178, is the first and only case which directly holds that a presumption such as that contained in section 176a does not violate the Fifth Amendment's proscription against testimonial compulsion. The Court indicated that the presumption was merely a rule of evidence, and in one ill-advised paragraph, the Court stated, in answer to the defendant's contention that the presumption violated his Fifth Amendment rights:

> ". . . The statute compels nothing. It does no more than to make possession . . . prima facie evidence of guilt. It leaves the accused entirely free to testify or not, as he chooses." 268 U.S. at 185.

The Court concluded by saying that if the accused is the only person who can rebut the presumption, that is a problem inherent in the case and one for which the presumption is not at fault.

In *Tot v. United States,* 319 U.S. 463, the Court invalidated the presumption contained in the Federal Firearms Statute that possession of a firearm by a felon was sufficient to establish that the firearm was shipped or transported in interstate commerce. Although *Yee Hem, supra,* would seem to have disposed of the applicability of the Fifth Amendment to this presumption, such is not the case, in light of Justice Black's statement (in which Justice Douglas joined) that:

> "It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation

> from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment." 319 U.S. at 473.

In *United States v. Gainey*, 380 U.S. 63, the Court upheld the presumption that mere presence at an illegal still was sufficient to convict a person for carrying on the business of operating a distillery. Strong dissents were filed by both Justice Black and Justice Douglas. In his dissent, Justice Black again referred to the relation between the statutory presumption and the defendant's Fifth Amendment rights:

> "The undoubted practical effect of letting guilt rest on unexplained presence alone, is to force a defendant to come forth and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. . . . I am aware that this Court in *Yee Hem v. United States*, 268 U.S. 178, 185 . . . held that the use of a presumptuous squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The Court's reasoning was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses.' That argument, it seems to me, would also justify admitting in evidence a confession extorted by a police-

> man pointing a gun at the head of the accused, on the theory that the man being threatened was entirely free to confess or not, as he chooses. I think the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it. . .. . " 380 U.S. at 87-88.

The next decision by this Court relevant to the issue here under discussion is *Griffin v. California,* 380 U.S. 609 (reh. den. 381 U.S. 957). In *Griffin,* the Court held unconstitutional that portion of the California Constitution which permitted comment by the prosecution on the failure of the defendant to testify. The Court also held unconstitutional and violative of the Fifth Amendment the court's instruction that the failure to testify constituted evidence of guilt.

The import of *Griffin* can best be understood when it is remembered that the Court in *Yee Hem* stressed the point that the presumption therein involved (which is identical to the one involved in the instant case) was no more than a *rule of evidence. Griffin* rejected such reasoning and held that such a rule of evidence violated the constitutional prohibitions of the Fifth Amendment. In *Griffin,* the Court stated:

> " . . . The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.
>
> "We think it does. It is in substance a *rule of evidence* that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. . . . The Court in the *Wilson* case stated:
>
> " ' . . . The act was framed with a due regard

> also to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses. It is not everyone who can faithfully venture on the witness stand though entirely innocent of the charges against him. Excessive timidity, nervousness, when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand. 'The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.' 149 U.S. 66."
> 380 U.S. 609, 613 (emphasis added).

In light of the foregoing analysis, and especially in light of *Griffin v. California, supra,* it is respectfully submitted that *Yee Hem* is out of harmony with the recent Fifth Amendment decisions of this Court and should be overruled. While it may ease judicial conscience to say that a presumption such as that contained in 21 U.S.C. 176a is merely a rule of evidence, such sophistry cannot obscure the true fact that such a presumption compels the defendant either to testify or to suffer a finding of guilt.

Furthermore, and independently, it is significant to note that section 176a provides that it is unlawful to import or smuggle marihuana into the United States "which should have been invoiced." It is respectfully submitted that the invoicing provision of section 176a is the same kind of registration provision which this Court has consistently held to be unconstitutional as violative of the Fifth Amendment in *Leary v. United States, supra; United States v. Covington,* 89 S.Ct. 1559; *Marchetti v. United States,* 390 U.S. 39; *Grosso v. United States,* 390 U.S. 62; and *Haynes v. United States,* 390 U.S. 85.

**(c) Whether Title 21 U.S.C. 176a Deprives Petitioner Of A Trial By Jury, In Contravention of the Sixth Amendment.**

Title 21 U.S.C. 176a, the statute which appellant was convicted of violating, contains the following presumption:

> "Whenever on trial for violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession *to the satisfaction of the jury*." (Emphasis added.)

The language of section 176a would seem to indicate that the statutory presumption is applicable only when the defendant is tried before a jury. This conclusion seems warranted in light of the fact that the statute provides that the defendant must explain his possession to the "satisfaction of the jury."

In *United States v. Jackson,* 390 U.S. 570, this Court

had before it the Federal Kidnapping Act, 18 U.S.C. section 1201(a), which provides:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped and held for ranson . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and *if the verdict of the jury shall so recommend,* or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (Emphasis added.)

This Court held the above-quoted portion of section 1201(a) to be unconstitutional in light of the fact that only the jury could return a verdict of death and, therefore, if the defendant chose to exercise his constitutional right to trial by jury, he was exposing himself to the death penalty. Only if he waived jury could the defendant be certain that no death penalty would be imposed.

The identical situation is present in the instant case. Thus, 21 U.S.C. 176a provides that the statutory presumption arises only in a trial by jury. Therefore, if the defendant desires to avoid the onus of the presumption, he must waive his constitutional right to trial by jury. If, on the other hand, he exercises his constitutional right to trial by jury, he is faced with the presumption, and the result is that his constitutional right to trial by jury has been chilled. In *Jackson,* the Court held that a statute which put the defendant in such a dilemma was unconstitutional. The identical holding is required with respect to the statute involved in this case.

**(d) Unconstitutionality Under The Fifth Amendment Of A Prior Conviction, And The Retroactive Application of *Leary v. United States.***

Petitioner herein was sentenced to 10 years in prison by reason of the fact that he was held by the court to be a second offender within the meaning of section 176a which provides that, for a second offense, the minimum term of imprisonment shall be 10 years. It is respectfully submitted that the court erred in finding the petitioner to be a second offender, in light of the fact that his previous conviction was had under an unconstitutional statute, to wit, Title 26 U.S.C. section 4704(a).

**(1) Failure to comply with Title 26 U.S.C. section 4704(a) is protected by the Fifth Amendment.**

Congressional intent manifested in the Marihuana Tax Act–and by implication 26 U.S.C. 4704(a)–was to tax transfers, including sales, to non-registrants; not to forbid them. *Leary v. United States, supra,* 89 S.Ct. at 1541.

Consistent with this policy of taxing transfers (sales, distributions, etc.), it was required that a registrant purchase stamps and affix them to the container of the narcotics. 26 U.S.C. 4771, 4703; 26 CFR 151.130, 151.41.

Title 26 U.S.C. 4704(a) makes it unlawful "for any person to purchase, sell, dispense, or distribute drugs except in the original stamped package or from the original stamped package." Thus, to avoid the penalty imposed by 26 U.S.C. 4704(a), anyone involved in "selling," "distributing," or "dispensing" such drugs would have to, in the case of an unstamped

package, (a) obtain a stamp, or, in the case of a stamped package, (b) ascertain whether the drugs were from the "original" stamped package. In either case, compliance with the stamp provision would have required petitioner, assuming he were a non-registrant, to unmistakeably identify himself as a member of a group inherently suspect of criminal activities, thus creating a "real and appreciable" hazard of incrimination. *Leary v. United States, supra,* 89 S.Ct. at 1539.

It is clear that in such a case failure to comply with the requirements of the statute by a possessor of narcotics cannot be punished, because of the protection of the Fifth Amendment. *Leary v. United States, supra,* 89 S.Ct. at 1544.

**(2) Petitioner is not barred from asserting his privilege against self-incrimination.**

Although petitioner failed to raise the privilege at the trial level, his failure to raise this issue was not a waiver of the constitutional privilege against self-incrimination. *Grosso v. United States, supra,* 390 U.S. 62, 71; *Isaac v. United States,* 293 F.Supp. 1096, 1098 (D.C. S.C. 1968); *Greenwood v. United States,* 392 F.2d 558 (4th Cir. 1968); *United States v. Rosenson,* 291 F.Supp. 874 (D.C. La. 1968); *United States v. Miller,* 406 F.2d 1100 (4th Cir. 1969).

The appellate court's decision to the contrary in this case, relying on *Graham v. United States,* 407 F.2d 1313 (6th Cir. 1969), demonstrates that there is a conflict among the circuit courts on this issue and that this Court must resolve the controversy.

**(3) The decision of this Court in *Leary* must be applied retroactively.**

The determination to give a decision retroactive application is governed by three criteria set forth in *Stovall v. Denno*, 388 U.S. 293, and *Desist v. United States*, 89 S.Ct. 1030 (1969). The three criteria are: (1) the purpose to be served by the new standard; (2) the extent of the reliance by law enforcement authorities on the old standard; and (3) the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States, supra*, 89 S.Ct. at 1033.

Although this Court has not yet had the opportunity to rule on the retroactivity of *Leary*, in *Isaac v. United States, supra*, the Court held that *Haynes v. United States, supra*, should be given retroactive application. By implication, the related cases of *Marchetti, Grosso*, and now *Leary* must also be given retroactive application. *United States v. Rosenson, supra.*

In *Isaac v. United States, supra*, the Court enunciated why the extension of retroactivity should be permitted in these cases:

> "The *Haynes* decision [and by analogy *Marchetti, Grosso* and *Leary*] does not affect persons convicted of a variety of crimes but only the crimes specified by the Act. Neither does it affect convictions in state courts. Therefore, the number of defendants affected by retroactive application . . . would be few as opposed to those who would have been affected by retroactive application of *Mapp v. Ohio*, 367 U.S. 643; *Miranda v. Arizona*, 384 U.S. 436;

*United States v. Wade*, 388 U.S. 218; and *Gilbert v. California*, 388 U.S. 263." 293 F.Supp. at 1099. *Cf. United States v. Miller, supra*, 406 F.2d 1100, 1102-1104 (4th Cir. 1969).

A clear conflict in the circuit courts exists, because in *Graham v. United States, supra*, the court held that the *Marchetti-Grosso* line of cases, and by implication *Haynes* and *Leary*, should be applied only prospectively (407 F.2d at 1315).

Assuming *arguendo* that petitioner's conviction must stand, nevertheless, if, as petitioner contends, the statute upon which his prior conviction was based is unconstitutional, then petitioner was entitled to be sentenced as a first offender.

## CONCLUSION

Several errors of constitutional magnitude were committed in this case. The appellate court implied a finding that the verdict was not based on an impermissible statutory presumption, when there was no way to determine if it had in fact been relied upon. Title 21 U.S.C. 176a, under which the petitioner was convicted, unconstitutionally violated petitioner's privilege against self-incrimination. Furthermore, that same statute deprived the petitioner of a trial by jury in violation of the Sixth Amendment. Finally, petitioner was treated as a second offender when his prior conviction could not be utilized in that it was unconstitutional by retroactive application of *Leary v. United States, supra.*

For these reasons, the requested writ of certiorari should be granted.

Respectfully submitted,

BURTON MARKS

*Attorney for Petitioner*

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN T. McCLAIN,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

No. 23,335

[September 18, 1969]

On Appeal from the United States District Court for the Central District of California

Before: BARNES and CARTER, Circuit Judges, and THOMPSON,* District Judge.

THOMPSON, District Judge.

Appellant was convicted by the Court, sitting without a jury, under an indictment charging that he, together with two others, on or about November 28, 1967, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of seventy kilograms of marihuana which he knew had theretofore been imported and brought into the United States contrary to law. Special findings of fact were waived.

The facts established by the evidence are that on November 23, 1967, one Juan Acosta Gutierrez, a Mexican, was hired in Tecate, Mexico, to drive a car containing marihuana to the "It Club" in Los Angeles, California, and there to contact a short, little, thin Mexican wearing black gabardine pants. He told the Customs officials about the plan. On November 24, he drove a

*Hon. Bruce R. Thompson, United States District Judge, Reno, Nevada, sitting by designation.

1955 Buick across the border containing sixty kilos of marihuana. The load was inspected by officials at the border and he was permitted to proceed under their surveillance. He drove to the It Club on Washington Street, parked the car, left the key under the mat in accordante with instructions, entered the Club and ordered a beer. While he was waiting, he saw Appellant and another man unload the marihuana from the car. Some time later, the Appellant and a co-defendant, Cruz-Castro, came up to Gutierrez where he was seated at the bar. Cruz-Castro, came up to Gutierrez where he was seated at the bar. Cruz-Castro told him the car was unloaded and he should return to Mexico. Cruz-Castro asked Appellant for $20 for gasoline so Gutierrez could return and bring back some more marihuana. Appellant gave Gutierrez the $20 and the latter returned to Mexico after reporting to the Customs officials.

On November 27, someone came to Gutierrez' home in Tecate and told him the car was loaded for another trip. He was given the same instructions and drove across the border to Los Angeles with the knowledge and under the surveillance of the Customs officers. He drove to the It Club where he met Cruz-Castro and waited for the car to be unloaded. While there, he saw Cruz-Castro in conversation with Appellant.

The co-defendant, Cruz-Castro, testified that he saw Appellant on November 24 at the It Club after he had been directed there by a man from Tijuana, Mexico, with instructions to receive money from a thin, regular stature Negro which would be paid for marihuana they were going to send him. Cruz-Castro was instructed to return to Mexico with the money. Cruz-Castro saw Appellant help unload the car after Gutierrez drove up and parked it, and Cruz-Castro handed the $20 to Gutierrez after Appellant paid it for gasoline. The next day, Appellant paid Cruz-Castro $1,600, the latter returned to Mexico and, upon instructions, traveled again to the It Club in Los Angeles to see Appellant and receive more money. Cruz-Castro met Appellant on Sunday, November 26, but the car with marihuana had not arrived. The following night, November 27, the car arrived. Appellant told Cruz-Castro and Gutierrez that they would have to wait a while for the car to be unloaded. When the car was unloaded, the witness saw Appellant put the packages of mari-

huana into a red suitcase and put the suitcase in another car. Cruz-Castro did not speak English and had to communicate with Appellant primarily by gestures.

Several Customs agents testified to the surveillance of the transactions. One saw a co-defendant, Jones, remove the packages of marihuana from the fender wells of the Gutierrez car and saw Appellant place some marihuana in a red suitcase and put it in the trunk compartment of a Cadillac, a car registered to someone else which Appellant was admittedly using for personal transportation.

Appellant argues that the conviction must be reversed because the statutory inferences of unlawful importation and knowledge thereof imputed to one in possession of marihuana are unconstitutional.[1] *Leary v. United States,* 395 U.S. 6. While the indictment in this case did not charge smuggling under 21 U.S.C. 176a, but charged reception and concealment of marihuana with knowledge of unlawful importation, the proofs adduced were adequate to sustain conviction of Appellant as a principal in a smuggling enterprise involving two specific unlawful importations from Mexico, as well as a conviction for the offense actually charged. The *Leary* decision has no applicability to a charge of smuggling marihuana across the border, *Witt v. United States,* 9th Cir., No. 23,065, decided June 6, 1969, and by parity of reasoning, has no relevancy to a reception and concealment charge where the evidence shows actual knowledge of and participation in the plan of illegal importation and the statutory inferences were not relied upon. If this had been a jury trial and the jury had been instructed on the statutory inferences, we would have a different case. But, as noted, the case was tried to the Court and specific findings were waived. On appeal, findings will be implied in support of the judgment if the evidence, viewed in a light most favorable to the Government, warrants them. *Pederson v. United States,* 9th Cir. 1968, 392 F. 2d 41; *Arraiga v. United States,* 9th Cir. 1963, 323 F. 2d 584; *Lustiger v. United States,* 9th Cir.

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[1]"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." Title 21 U.S.C., § 176a.

1967, 386 F. 2d 132.[2] Here the evidence competently supports an implied finding that Appellant had actual knowledge of unlawful importation and was an active participant in the entire plan. Cf. *Juvera v. United States*, 9th Cir. 1967, 378 F. 2d 433. It is also interesting to observe that in his oral comments on the evidence at the time of rendering judgment, the trial judge did not once mention or allude to the statutory inferences. He relied upon the principles of "aiding and abetting, counseling, conspiracy and joint venture."

In a further attack upon the constitutionality of the statute (Fn. 1, supra), Appellant argues that the phrase "unless the defendant explains his possession to *the satisfaction of the jury*" (emphasis added) brings the statute within the case of *United States v. Jackson*, 1968, 390 U.S. 570, and requires a defendant to waive a jury trial in order to avoid the statutory inferences inasmuch as they apply only to a jury trial and not to a court trial. In *Jackson*, the Supreme Court could not attribute to the words "the jury" the generic connotation of "the trier of fact" inasmuch as the legislative history related by the Court required a conclusion that Congress intended only the jury, after a plea of not guilty, and not the Court, after a jury-waived trial or after a plea of guilty, to have power to impose capital punishment. In truth, the restrictive intent of Congress was so patent with respect to the meaning of "the jury" in the Federal Kidnapping Statute that the Government did not dispute the proposition that "the federal statute authorizes the jury—and only the jury—to return a verdict of death." 390 U.S. 572.

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[2]"Lustiger did not request the trial court to find the facts specially, as he might have done under Rule 23(c), Federal Rules of Criminal Procedure, and no special findings were entered. It follows that we must assume that the trial court found in favor of the Government with respect to each and every alleged statement or concealment relied upon by the Government.

"This being the case, Lustiger cannot obtain reversal on the ground that some of the representations or concealments of material fact relied upon by the Government were not proved to be false, misleading or deceptive. As long as a sufficient number of the statements were shown to be knowingly false, deceptive or misleading to permit the trial court to infer that defendant intentionally engaged in a scheme to defraud, the conviction must be affirmed. Ballard v. United States, 9 Cir., 138 F. 2d 540, 545." *Lustiger v. United States*, 386 F. 2d 132 at 135-136.

No similar legislative intent has been demonstrated with respect to the statutory inferences articulated in 21 U.S.C. 176a and its companion, 21 U.S.C. 174. These statutes simply declare rules of evidence (*Yee Hem v. United States*, 1925, 268 U.S. 178) and, construed in pari materia with decisions and rules permitting waiver of jury trial (Rule 23, Federal Rules of Criminal Procedure; *Patton v. United States*, 1930, 281 U.S. 276) are applicable equally to court trials and jury trials. Indeed, this interpretation has been acknowledged for years without known objection from bench or bar. For example, in *Verdugo v. United States*, 9th Cir. 1968, 402 F. 2d 599, the Court stated: "The second paragraph of section 174 permits *the trier of fact* to infer guilt from unexplained possession." (Emphasis added.) Both *Hernandez v. United States*, 9th Cir. 1962, 300 F. 2d 114, and *McIntyre v. United States*, 9th Cir. 1967, involved jury-waived trials in which the statutory inferences were relied upon without question. The words "the jury" in sections 174 and 176a should not be read as excluding the Court in non-jury cases. A like result was reached in *Bartch v. United States*, 10th Cir. 1964, 330 F. 2d 466, in construing Colorado's wrongful death statute in a non-jury federal tort claims action where the statute provided: "• • • In every such action *the jury* may give such damages as they may deem fair and just, not exceeding twenty-five thousand dollars • • •." (Emphasis added.) Under this interpretation, there is no basis for Appellant's contention that he must waive a jury trial to avoid the statutory inferences.

Appellant also contends that the conviction must be reversed on the ground that the marihuana was lawfully imported with the knowledge and under the surveillance of Customs agents. The argument is without substance. *Juvera v. United States*, 9th Cir. 1967, 378 F. 2d 433; *Pederson v. United States*, 9th Cir., 392 F. 2d 41.

After the trial and judgment of guilt, the United States filed an information alleging a prior conviction of defendant under 26 U.S.C. 4704(a) for having, on May 5, 1958, unlawfully sold and distributed 324 grains of heroin not in or from its original stamped package. The Court thereupon sentenced defendant to the minimum term of ten years as a second offender under 21 U.S.C. 176a. At sentencing and again on appeal, defendant con-

tended that the prior conviction was void because of the rulings in *Marchetti v. United States*, 1968, 390 U.S. 39; *Grosso v. United States*, 1968, 390 U.S. 62; *Haynes v. United States*, 1968, 390 U.S. 85; *Leary v. United States*, 1969, 395 U.S. 6; and *United States v. Covington*, 1969, 395 U.S. 57.

The Government asserts that such an attack on a prior conviction may be entertained only in an independent civil suit under 28 U.S.C. 2255, or a writ of error coram nobis, but the cases cited do not support the thesis. It is, of course, established that a 2255 petition is available to dissolve a void conviction for which a defendant is confined or under restraint, *Heflin v. United States*, 1959, 358 U.S. 415, and the coram nobis writ may be pursued in proper circumstances to inquire into the validity of an ancient conviction, *United States v. Morgan*, 1954, 346 U.S. 502, but the availability of such a remedy in a given case does not require a conclusion that it is the only remedy. In this case, the Government asserted the prior conviction to enhance the mandatory minimum sentence required to be rendered. Defendant contested the fact of the prior conviction upon the ground that it was void on its face—that it was, in effect, a nullity. He did not assert any factual issues which would require an evidentiary hearing to resolve the dispute and which might justify remission of the defendant to a collateral remedy. Limiting our ruling to the precise situation in this case, we discern no obstacle to the consideration by the sentencing court of the validity of the prior conviction and we hold that the question is properly before us on appeal.

The prior conviction for the 1958 heroin transaction was not void on its face and was properly invoked to enhance the required mandatory minimum sentence for the following reasons:

1. The decisions relied upon by Appellant did not declare the narcotics tax statutes to be unconstitutional per se. Each one of them is predicated upon a timely assertion of the privilege against self-incrimination by the person accused. Such a claim of privilege does not appear from the face of the record of prior conviction relied upon in this case. The privilege cannot be claimed for the first time in a collateral attack on the judgment of conviction. *Graham v. United States*, 6th Cir. 1969, 407 F. 2d 1313.

2. The prior conviction was based on a violation of 26 U.S.C. 4704(a), a sale of heroin not in or from the original stamped package. In our view, the constitutionality of this provision of the Narcotics Tax Act is not affected by the Marchetti-Grasso line of cases. The Act and regulations require tax stamps to be purchased by persons registered in Class I, i.e., importers, manufacturers, producers and compounders, and to be affixed to the bottle or container of narcotics. 26 U.S.C. 4771, 4703, 26 CFR 151.130, 151.41. The penalty statute (26 U.S.C. 4704) then makes it unlawful "for any person to purchase, sell, dispense, or distribute drugs except in or from the original stamped package." This provision is separable from and not affected by the registration (26 U.S.C. 4722), possession (26 U.S.C. 4724) and order form (26 U.S.C. 4705) provisions of the Narcotics Tax statutes. If it is an unstamped package of narcotics and any person sells, dispenses, purchases or distributes drugs in or from it, he commits an offense and no infringement of his privilege against self-incrimination is involved. Cf. *Montgomery v. United States*, 9th Cir. 1969, 407 F. 2d 1312.

Appellant's point that the Government cannot tax a prohibited transaction is without merit. *United States v. Yuginovich*, 1921, 256 U.S. 450; *Adelman v. United States*, 9th Cir. 1949, 174 F. 2d 283.

The judgment is affirmed.

# PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
County of Orange )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on JANUARY 7th, 1970, I served the within PETITION FOR WRIT OF CERTIORARI (McClain v. United States, October Term, 1969, No. .....) on the following by depositing two copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed as follows:

UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C.

U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT
SEVENTH & MISSION STREETS
SAN FRANCISCO, CALIFORNIA

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 7th, 1970, at HUNTINGTON BEACH, CALIF.

D. A. Standefer

41 COPIES TO THE SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.
VIA AIR PARCEL POST